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Supreme Court of the United States

OCTOBER TERM—1966

No. 405

MILTON LEVY, MEYER GOLD and GELT CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Petitioners,

vs.

SAL LIMANDRI and LIM-LOW CONSTRUCTION CO., INC., a corporation of the State of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Jurisdiction

This case involves an order of the Appellate Division of the Superior Court of New Jersey, denying the opening of a default judgment entered against the petitioners for failure to answer interrogatories more completely. The judgment was affirmed and certification denied by the Supreme Court of New Jersey, on May 17, 1966. Jurisdiction is conferred on this court by 28 U. S. C., Sec. 1257 (3).

Questions Presented

Is the abuse of due process, which occurs when a Court's discretionary powers are used arbitrarily and unjustly, reviewable by the United States Supreme Court where:

(a) a meritorious defense was suppressed for failure to give more specific answers to interrogatories, and a final judgment entered against defendants?

(b) defendants have suffered a final judgment against them while in the exact same circumstances and for the exact same reasons a plaintiff would be required to suffer less than a final judgment, i.e. are defendants to be treated differently under the law than plaintiffs?

(c) a judgment is entered against a party for procedural wrongdoing when that wrongdoing consists of acts by his attorney?

Constitutional Amendment Involved

Amendment XIV—Due Process of Law

Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule Involved

New Jersey Revised Rules, Rule 4:62-2 (In Part)

On motions, with briefs, and upon such terms as are just the court may relieve a party or his legal representative

from a final judgment, order or proceeding for the following reasons:

(a) Mistake, inadvertence, surprise or excusable neglect.

Statement

Defendants were sued by plaintiffs in January, 1964. A Complaint was filed on January 10th of that year (D1a). They responded by retaining an attorney namely, William Kaufman of the law firm of Kaufman and Kaufman, Esqs., Elizabeth, New Jersey, to defend and counterclaim. On January 29th, within the proper time for filing such pleadings, Mr. Kaufman caused an Answer and Counterclaim to be filed (D5a). These pleadings joined the issue. It seemed that the plaintiffs claimed that they were unpaid for bricks and labor supplied to the defendants' construction site. The defendants claimed that payment was regular and proper, and they denied a balance due as claimed by the plaintiffs. They alleged the statute of frauds (D6a-29). Other allegations by the defendants effectively established that a meritorious defense existed. This was also asserted in the opinion of their attorney (D53a, 20).

Thereafter, the management of the suit was left by the defendants in the hands of their attorneys. It is the understanding of the defendants that their attorney served notice to take oral depositions upon the plaintiff, Sal Limandri, on February 19, 1964 (D53a-30). These depositions were argued about, postponed and a new date finally set in the office of David Cohn, the attorneys for the plaintiff. On the date that they were to be taken, Mr. Kaufman did not appear to take them (D53a-34).

After Mr. Kaufman gave notice of taking depositions, he was served with Interrogatories by Mr. Cohn. The defendants received notice that they should supply answers, by several letters and by some telephone calls from Mr. Kauf-

man. The questions were not fully understood by the defendants (D37a-31). No personal conferences were held, however, in spite of the fact that the defendants were in and out of the office of Mr. Kaufman (D54a-25). Mr. Kaufman was of the opinion that the failure to formulate answers was not wilful or deliberate (D54a-30).

Plaintiffs' attorneys motioned the court for an Order striking the Answer and appearance of the defendants for failure to answer Interrogatories. That Order was returnable on the 17th of April, 1964. Mr. Kaufman did not appear to respond and an Order was entered compelling the answers to Interrogatories, on that date.

A further notice of motion was served on Mr. Kaufman by the attorneys for the plaintiffs, reiterating the threat of entry of judgment, on May 26, 1964, returnable on June 5, 1964, and again Mr. Kaufman did not appear, but at this time the Interrogatories were answered (D12a). The answers were prepared by Mr. Kaufman as the result of the defendants giving to him Memoranda of answers (D19a).

These did not satisfy the attorney for the plaintiffs and he moved for more specific answers on June 30, 1964. The return day of that motion was July 9, 1964. Mr. Kaufman did not appear on the return date and an Order was entered compelling more specific answers, on that day. In the meantime, it is to be noted that the depositions which Mr. Kaufman requested to be taken of the plaintiff, Sal Limandri, were not taken. Thereafter, more specific answers were not supplied to the plaintiffs' attorney and he moved for a default judgment (D26a). An Order was entered to that effect and a date set for proofs for entry of such judgment on October 14, 1964. To neither of these hearings did Mr. Kaufman respond, nor did he appear. Mr. Kaufman indicated by affidavit that he did not receive such notice even though the plaintiffs' attorney demonstrated a postal re-

turn receipt indicating notice given to Mr. Kaufman. Mr. Kaufman alleges that he warned his clients to answer Interrogatories. The defendants, however, indicated that they were confused by the questions and relied entirely on Mr. Kaufman's ability as an attorney. Thereafter, an Order for judgment was entered (D31a) and new attorneys substituted for Kaufman and Kaufman, namely, Warren, Chasan, Leyner and Holland, Esqs., Jersey City, New Jersey (D33a).

Mr. Chasan of that firm moved to set aside the judgment but did not argue the responsibility of Kaufman and Kaufman, and in fact, avoided such argument (D47a). The Court, likewise, did not consider either Mr. Kaufman's affidavit submitted in the cause (D90a-10), but found that the defendants were neglectful and that such neglect was not excusable (D90a-28). It did not find Mr. Kaufman's conduct at fault (D84a, *et seq.*).

An appeal was taken to the New Jersey Superior Court, Appellate Division, which appeal affirmed the decision of the trial court. Again, the conduct of prior counsel was not argued or discussed. Subsequent appeal to the New Jersey Supreme Court for a Writ of Certification was denied. Neither the Appellate Division nor the New Jersey Supreme Court wrote an opinion.

The defendants were required to post Supersedeas Bond upon taking those appeals; upon taking this appeal, they have been required to add a further Supersedeas Bond to that already posted.

These inherent facts of the case, resulting in a default judgment by the working of procedural rules, bring about the question of due process. This argument was made to the New Jersey Supreme Court in the briefs filed by Warren, Chasan, Leyner and Holland, Esqs., on petition for certification. The New Jersey Supreme Court denied without opinion.

ARGUMENT

POINT I

The denial of the relief from the judgment rendered against the petitioners was violative of the Fourteenth Amendment denying the petitioners due process of law.

In the case at bar, the petitioners contend that their right to a day in court was denied arbitrarily and without due process. Taking the phrase at its basic meaning, the minimal requirements of "due process", "includes a reasonable notice of the nature of the proceedings and a fair opportunity to be heard therein". *Fantony* v. *Fantony,* 36 N. J. Super. 375, 115 A. 2d 610, 612, modified in 21 N. J. 525, 122 A. 2d 593 (1964).

Moreover it has been reiterated by the federal courts that the demands of due process required by the Fourteenth Amendment are such as accord with the traditional concepts of fair play, substantial justice, and a resolution on the merits of the case. *Murphy* v. *Helena Rubenstein Co., Inc.,* 234 F. Supp. 893 (D. C. N. J. 1964). In another New Jersey case, the Supreme Court of that state in discussing the adequacy of procedures in tax appeals, held that a litigant must be permitted to make an impressionable contact with the powers of decision. *Fifth Street Pier Corp.* v. *City of Hoboken,* 22 N. J. 326, 126 A. 2d 6, 12 (1964).

In the present case, there has been no "impressionable contact" between the petitioners and the courts. The petitioners have never been to court. Not one of them has ever heard the voice of a judge, nor has any judge looked upon their faces. Yet, some $25,000.00 is about to be taken from them and given to another, without due process of law. In order to obtain a valid judgment, the party seek-

ing it must grant his opponent an opportunity to be heard, or there is a denial of due process. *Chassis-Trak, Inc.* v. *Federated Purchaser, Inc.*, 179 F. Supp. 780 (D. C. N. J. 1960); *Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 425 (1943).

There can be no doubt that the defendants-petitioners case had merit. A cursory examination of the pleadings and affidavits indicate issues of fact (D1a; D7a; D34a; D41a; D60a). The price of bricks, the number of bricks, the amount of the balance owed, the terms of the agreement (it not having been in writing), all of these things put the defense on a par with the complaint so far as substance is concerned. Clearly, had a motion for summary judgment been made it would have been denied; and even more clearly, it was not made.

The question, then, is one of procedure and whether or not that procedure was offensive to the rules of fair play, reason, and sound discretion. If that procedure was offensive then there was a deprivation of due process of which the petitioners now complain.

The imposition of default judgment is the harshest of penalties which a litigant may suffer. Through it, the litigant is deprived of his voice, his defense. He literally never gets to tell his side of the basic disagreement between the parties. It is for this reason that the courts have been loathe to enter such judgments. For procedural offenses, many alternatives exist and are invariably provided by the rules of court short of default judgment. Fines, contempt citations, striking of parts of pleadings, suppression of parts of defenses, holding a debated fact as proved, and even incarceration, are all more likely to be used. N.J.R.R. 4:27-2. This is proper, because final default judgment is a drastic remedy on a par with the

lesson learned by an executed criminal. It is the end purpose of the courts in applying this principle that every case be tried on its merits; it is the courts purpose that only in the most extreme cases is a party to be deprived of his day in court and only if the conduct of that party does not warrant any forgiveness.

In that same spirit the courts have been receptive to applications to reopen final judgments granted on procedural grounds where no trial has been held. It has long been held, in New Jersey, that "... great liberality should be allowed in opening a judgment which went by default, and any reasonable grounds would be tolerated ..." See *Loranger, et al* v. *Alban, et al,* 22 N. J. Super. 336, 92 A. 2d 77 (1952), a case in which the defendant had appealed a default judgment entered for not filing an answer.

The federal court system has followed this line of thought, to the end that cases be tried on their merits. "Any doubt should be resolved in favor of the application to set aside the judgment to the end of securing a trial upon the merits." *Huntington Cab Co.* v. *American Fidelity and Casualty Co.,* 4 F. R. D. 496, 498 (1945). In fact the tone of the state and federal decisions in this entire area of the law has been that the sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply and its use must be tempered by judicial discretion to assure that its imposition is merited. *Huntington Cab Co.* v. *American Fidelity and Casualty Co., supra.*

The difference between arbitrariness and discretion is reason. Petitioners contend that the decision denying their application for relief was an abuse of discretion and, in fact, arbitrary as being without reason. There was no recognition by the lower court of any of the realities of the

case. The fact that the defendants failed to comprehend the language put forth in the interrogatories and the fact that they relied entirely upon their then attorney was held by the lower court to be inexcusable neglect. That decision is contrary to common experience; it is contrary to the weight of the law; and it is contrary to the liberality of thought and reason discussed above.

In *Coggin, et al* v. *Baufield,* 150 Fla. 551, 8 So. 2d 9 (1942), a default had been entered against the defendants for failure to plead. The court held that the matter of reopening a judgment is one of judicial discretion, and in the case of a reasonable doubt, where there has been no trial on the merits, this discretion should usually be exercised in favor of granting the application to get a determination on the merits. The court said, in part, "The defendant who is willing to have a trial should be permitted, when innocent of culpable negligence." The petitioners, herein, contend that the myriad of confusing facts in this case presented at least a reasonable doubt and that they were not guilty of "culpable negligence." Their biggest offense was in their failure to understand the questions presented to them, to understand the importance of the requirement to answer them and then to expand on those answers, and finally they failed to understand the grave consequences that would follow if they did not.

Yet the facts show that petitioners acted as reasonable men do. And the law shows that that is all that was required of them. *Jarrett* v. *Standard Diesel Engine Co.,* 124 N. J. L. 429, 12 A. 2d 671 (1940). They were sued for money. They had a defense. They went to a lawyer. The lawyer filed an answer and did the things, to their minds, that lawyers are supposed to do. As businessmen, caught up in their business problems, they did as businessmen do.

They left matters to their lawyer. What their lawyer did, and whether or not his conduct (or lack of it) is their responsibility or the courts (or just his own) will be dealt with in a later point. But so far as they are concerned, *they* did what was reasonably expected to be done by clients; and then awaited a day to come to trial and tell their story.

In the meantime, they supplied, in short memo form, answers to interrogatories that they understood they had to answer, leaving the details to their attorney. Notices of motion, orders compelling answers, orders striking defenses, notices to appear were all sent to their attorney. They expected that attorney to be responsive or to appear. It seemed reasonable that if he did not, that he knew what he was doing and did not have to. Certainly it was not for them to appear alone or on their own initiative.

Members of the Bar and Bench are familiar with the weight of responsibility a lawyer assumes when he takes a case. And conversely they are aware that a client's burden is diminished and his sense of responsibility mitigated when that lawyer *does* take his case. It was under this mitigated sense of responsibility that the petitioners awoke one day to learn that their bank account had been levied on. *They* were awaiting a trial date, and the plaintiff already had his judgment.

Still, the argument is well taken that says the procedures of court must be obeyed. A showing of bare impudence or lack of cooperation must bring the court's raw power to bear. The court must have the power to deal with triflers and impudents. No argument is here made that the lower court did not have the right to enter a default. But what it should have done was set such default aside when it was shown that the alleged triflers were really sincere if un-

knowing; that they who appeared to ignore orders did not even know of them. It is at this stage, the point where the question arises as to whether a default should be reopened that the level of indulgence should be lowered. To take a man's property, without hearing his defense, is no small thing. Before a court does so, it must be certain that the aggressiveness of plaintiffs' counsel, the ignorance of defendants, the conduct of defendants' counsel, the pressure of court calendars all are not conspiring to do a harm greater than the offense the court means to punish.

The standards for reopening such defaults are then, to be lessened in the face of a reasonable explanation. *Huntington Cab Co.* v. *American Fidelity and Casualty Co.*, 4 F.R.D. 496 (1945). The rule in New Jersey is that discretion shall be affirmatively used where there is "excusable neglect". R.R. 4:62-2(a). It would appear to be a paradoxical phrase. One word is inimicable to the other. But such is the intent of the rule: keep the power, like holding a big club, but wield it wisely with patience and understanding.

"Excusable neglect" refers to the conduct of the litigant, not of the attorney, and neglect of the attorney, though inexcusable may be cause for relief. *Reierson* v. *York*, 227 N. C. 575, 42 S. E. 2d 902 (1947). Moreover it was held in *Duenow, et al.* v. *Lindeman, et al.*, 223 Minn. 505, 27 N. W. 2d 421 (1947), that a litigant is not to be penalized for the neglect or mistakes of his attorney, and the court will relieve parties from the consequences when it can be done without prejudice to his adversary. (It should be pointed out that no possible prejudice can be done to the plaintiffs since supersedeas bonds have been posted to assure payment if in fact the plaintiff can win his case, on the merits, in open court.)

To conclude this point, it is well to point to Rule 37 of the Federal Rules of Civil Procedure, which deals with the question. The rule (and it is much like New Jersey's) was discussed in the case of *Cardox Corp.* v. *Olin Mathieson Corp.*, 23 F.R.D. 27 (D. C. Ill. 1958). It basically provides that if a party wilfully fails to serve answers to interrogatories after proper service of such interrogatories, the court may strike all or part of the pleadings of that party. But in the *Cardox* case, *supra*, the court held that "wilful failure" means any conscious and intentional failure to comply with the rule, and ". . . the rule should not be applied to situations in which certain of the answers be insufficient to satisfy the rule because they do not constitute full answers".

POINT II

The discrepancy between the penalties assessed against a plaintiff as against the same penalties assessed against a defendant for not complying with discovery procedures resulted in a denial of due process.

The Rules of Court of New Jersey, provide sanctions and penalties for non-compliance with discovery measures. They go from arm twisting to obliteration;

"4:27-2. FAILURE TO COMPLY WITH ORDER

(a) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of that court.

(b) *Other Consequences.* If a party or an officer, director or managing or authorized agent of a party fails to obey an order made under Rule 4:27-1 requiring him to answer designated questions, or an

order made under Rule 4:24-1 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rules 4:25-1 and 4:25-2 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the failure to obey as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or entering a default against the party who fails to obey.

(4) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or an officer, director or managing or authorized agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

Note: Effective September 9, 1953; paragraph (b)(3) amended July 27, 1961 to be effective September 11, 1961. Formerly Rule 3:16-38, amended January 1, 1953.

What is peculiar about this rule is this: If one is a plaintiff and refuses to comply with discovery procedures, one's worse punishment will be a dismissal without prejudice. Such a plaintiff is free to start his suit again. The dismissal is never an adjudication preventing the suit from being heard again. The plaintiff will come to court another time. Aside from a reprimand, a delay and minimal expenses (possibly even including costs and counsel fees to his opponent) the plaintiff (Ah! what a benefit to be aggressive) lives to fight another day. *Burke* v. *Central Railroad Co. of New Jersey*, 42 N. J. Super. 387, 126 A. 2d 903 (1956). He is deprived of neither his chose-in-action, his injury nor his insult.

But, if one is a defendant, and if one is unfortunate enough to fall afoul of the discovery rules, then the penalty is conclusive and terrible. A judgment against a defendant is, by its very nature, the last rattle for him. He does not get to go to court some other day. He has had it; his property is forthwith given to another.

Such a distinction is not equal justice under the law. To have one's property taken in such a manner is a deprivation of due process of law. *Mitchell* v. *McDonald*, 114 Mont. 292, 136 P. 2d 536 (1943). The distinction should be abated, and only the United States Supreme Court can abate it.

In this case the New Jersey Supreme Court was asked to review its own rules. This is not consonant with reasonable expectation. However, it was so asked by a petition for writ of certification. This was denied without opinion. One can speculate that the New Jersey Supreme Court invoked its known rule that it will not review what it feels are the facts of a discretionary case. Yet, when such discretion is abused, due process is abused. The gravamen of such abuse is the dichotomy of a rule granting plaintiffs one justice and defendants another.

POINT III

A judgment should not have been entered against the defendants for procedural wrongdoing when the acts of their attorney constituted all or even part of the wrongdoing.

The attorney-client relationship is a principal-agency relationship. But it must be quickly pointed out that the attorney is a very special type of agent. Both his client and the public can expect and get a little more from him than other agents. *In re Boyle,* 18 N. J. 415, 113 A. 2d 818 (1955). It happens also that an attorney is the agent of the courts. In fact, he is an officer of the courts in which he is admitted to practice. The courts, too, expect and get a little more from him than from any other agent who comes to it. The relationships between court, client and attorney are fraught with responsibility. They call for the highest standards of care, conduct and duty. And what is more, these responsibilities run from one to all and from every to each. *In re Boyle, supra.*

It follows that when a lawyer's acts result, as here, in an extraordinary taking of defendants' property some responsibility falls upon the court. The court should have measured the attorneys' lack of diligence or worse, his negligence. Some examination should have been made of his conduct. And the court should have done this voluntarily, without argument of succeeding counsel. The court below should have known that counsel might not want to impugn his predecessor's conduct. This was peculiarly for the court to look upon and denounce. To blindly whitewash the conduct of the attorney who conducted the case was putting a weight on clients beyond their ability to carry. To disavow the responsibility for pointing out the attorney's actions, to award a judgment against his clients, to

avoid the responsibility a court has for its agent and officer was, in fact, a denial of due process. A judge who punishes a layman for the non-performance of the sophisticated acts required of a lawyer abuses the privilege he is given of extending understanding and discretion to the public. The following is a list of the acts or non-acts of counsel which the court was shown but which it chose to overlook:

(a) Defendants' attorney ordered depositions to be taken of the plaintiff and then did not appear to take them;

(b) Defendants' attorney ignored the fact that he requested depositions before interrogatories were served by the plaintiff, which gave him a priority of discovery. Had those depositions been pursued, he would have obviated the necessity of making answer to the interrogatories, which necessity was the basis for the appealed from judgment;

(c) Defendants' attorney, while noting that he wrote or telephoned to the defendants to get them to answer questions, indicated that his clients were in and out of his office but, he claimed, they never did have a conference at which the answers could be resolved (D54a);

(d) Defendants' attorney did not appear on the return day of five motions or other days in court, notices for which were given to him. The purpose of these court days varied from compelling interrogatories, compelling more specific answers to interrogatories (D24a, D25a and D27a), striking answers and counterclaim or taking proofs for entry of judgment (D30a);

(d) Defendants' attorney answered interrogatories inartfully by literally transcribing the notes of his clients, using minimal draftsmanship;

(e) Defendants' attorney failed to inform defendants of the return days for argument of items listed herein at paragraph (c). He claimed later that he got no notices yet attorney for the plaintiff attached copies of postal registration cards for such notices signed by the office staff of the defendants' attorney as being received by his office (D73a).

All of these things, the lower court heard as if they were regular modes of conduct of any lawyer. No particular significance was attached to them.

For a judge to ignore such conduct from an "Officer of the court" and cast the blame for such conduct on the client of such "officer of the Court" is to deny that client due process of law. (It might be pointed out that a possible action for negligence by the defendants against their former attorney will not allow their meritorious defense to be heard in the instant case, nor will it comfort them; for the plaintiffs are no more deserving of Mr. Kaufman's money than they are of the defendants).

In a similar situation, *Jarrett* v. *Standard Diesel Engine Co., Inc., et al., supra,* the defense of an action was turned over to an attorney. His answer to an amended complaint was filed late. The reason, the court found was the "carelessness and neglect" of the attorney. The defendant had, as in the case *sub judice,* a meritorious defense. The court there held that the defendant had done "as much as the average layman would do when he was originally served with the summons by taking it to his attorney and leaving the matter in his hands". The time for answering and filing, "were nothing which he should be charged with personally. He had reposed trust and confidence in his attorney to handle the matter according to law for him, and therefore, should not be penalized by being prevented from interposing a defense to the claim made against him because of such neglect and failure of diligence on the part of his counsel".

The court below found the petitioners' conduct deliberate (D91a). The petitioners contend that their conduct was reasonable. Again, in the *Jarrett* case, *supra*, the court continued: ". . . when it reasonably appears that such default judgment resulted solely from the neglect of the attorney of defendant to file an answer within time, and when injury or wrong has resulted or may result to a defendant therefrom, the judgment will be opened to permit proper pleadings to be filed".

Had reason been the guidepost of the lower court the decisional law in New Jersey would have demanded relief from the judgment. The *Jarrett* case, *supra*, was based in part on a then existing statute in New Jersey. The statute reaffirmed the basic common law principles. It reads (N.J.S.A. 2:27-115) as follows:

> "If, in any action judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading, the court or judge shall, on application within one year after the entry of such judgment, open such judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court or judge, injury or wrong has resulted or may result from such failure."

The New Jersey Rule requiring only "excusable neglect" supplanted this statute. It is even more liberal. The New Jersey Supreme Court said of this rule that it must be applied "rationally and with fair recognition of the fact that justice to the litigants is always the polestar." *Alberti* v. *Civil Service Commission*, 41 N. J. 147, 195 A. 2d 297 (1963).

CONCLUSION

The petitioners have been denied relief from a default judgment entered against them. The entry of the default

was due largely to the alleged conduct of their attorney. The denial of the relief was contrary to the abundance of cases in New Jersey and the federal arena. The *Jarrett, Huntington* and *Coggin* cases were direct and clear in this matter. There is no question but that the judgment should have been opened. The failure to do so was error.

The court below should have considered that there was a question of the attorneys' conduct and should have taken the initiative to look into the matter since it was known to the court that the petitioners could not have done it while defending this action. There has been no indication by the court that it even considered the matter. The cases cited indicate a necessity of liberality of thought and equitable principles in imputing an attorney's conduct to his client.

The petitioners did no more than what should have been expected from any other defendant in a similar situation. They acted reasonably and prudently. This decision penalized them for so acting.

The petitioners have been denied a fair and reasonable opportunity to be heard, thus being denied the due processes of the law guaranteed them under the Fourteenth Amendment of the Constitution of the United States.

No intrusion on *stare decisis* is contemplated if the court were to grant this application for writ of certiorari. The cases, in fact, support the position of the petitioners. A basic holding is now required which would remove a glaring unfairness and apparent compromise of such a valued and venerated right as the right to due process of law.

Wherefore, the petitioners pray that a writ of certiorari be granted, enabling this court to review the judgment below to the end result that the order heretofore entered by the Superior Court of New Jersey, denying relief from the default judgment be reversed, and that the affirmance of such denial by the Appellate Division of the Superior Court be reversed, and that the default judgment be vacated upon such terms as are just and that there should be a trial on the merits.

Respectfully submitted,

RUDD, ACKERMAN & BREITKOPF,
Attorneys for Petitioners.

BERNARD RUDD,
MICHAEL BREITKOPF,
Of Counsel.

APPENDIX A

Opinion of Appellate Division

Argued February 21, 1966—Decided March 4, 1966.

Before: Judges CONFORD, KILKENNY and LEONARD.

MR. LEWIS M. HOLLAND argued the cause for Defendants-Appellants (MESSRS. WARREN, CHASAN, LEYNER & HOLLAND, attorneys).

MR. DANIEL CRYSTAL argued the cause for Plaintiffs-Respondents (MESSRS. DAVID & ALBERT L. COHN, attorneys).

PER CURIAM.

Judgment affirmed.

APPENDIX B

Order Denying Petition

SUPREME COURT OF NEW JERSEY

SAL LIMANDRI, *et al.*,

Plaintiffs-Respondents,

vs.

MILTON LEVY, *et al.*,

Defendants-Petitioners.

ORDER DENYING PETITION

APPELLATE DIVISION, SUPERIOR COURT:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 17th day of May, 1966.

JOHN H. GILDEA,
Clerk of the Supreme Court.